No. 17-1091

IN THE

Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

On Writ of Certiorari to the Indiana Supreme Court

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONERS

SHERRILYN A. IFILL
Director-Counsel
JANAI S. NELSON
SAMUEL SPITAL
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector Street
5th Floor
New York, NY 10006

DANIEL S. HARAWA*
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
700 14th St. NW
Suite 600
Washington, DC 20005
(202) 682-1300
dharawa@naacpldf.org

Counsel for Amicus Curiae

**Counsel of Record*

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INTERESTS OF AMICUS CURIAE

From its earliest advocacy led by Justice Thurgood Marshall, the NAACP Legal Defense and Educational Fund, Inc. ("LDF") has strived to secure the constitutional promise of equality for all people. Petitioner asks the Court to consider an important question about the Fourteenth Amendment's reach, which, more than any other constitutional provision, embodies our Nation's commitment to equal justice under the law.

Since its founding close to 80 years ago, LDF has been at the forefront of efforts to enforce the Fourteenth Amendment's promise of equality. *See, e.g.*, *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Loving v. Virginia*, 388 U.S. 1 (1967). LDF submits this brief to help the Court decide whether the Fourteenth Amendment's Due Process Clause incorporates the Eighth Amendment's Excessive Fines Clause. LDF also submits this brief to propose an approach to incorporation that more closely aligns with the anti-subordination principle at the core of the Fourteenth Amendment.[1]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

INTRODUCTION

150 years ago, the Nation faced a defining moment. A bloody Civil War about whether Southern States would be able to continue to enslave Black people had torn the country in two. After defeating the Confederacy, at a cost of more than 600,000 lives,[2] the Union had to devise a way not only to guarantee formerly enslaved Black people equal rights, but also to protect these newly-won rights from Southern aggression.

Congress began by adopting the Thirteenth Amendment to end slavery, which the States ratified. The Southern States responded to slavery's abolition by enacting the Black Codes—laws designed to repress African Americans and recreate slavery-like conditions. To combat the Black Codes, Congress passed the Civil Rights Act of 1866, which gave the Federal Government power to protect the civil rights of Black Americans. But there was a question of the Act's constitutionality, so Congress proposed another constitutional amendment to remedy that concern: The Fourteenth Amendment.

The Fourteenth Amendment had two important purposes. One, it guaranteed equal rights to all people in all States, particularly African Americans. Two, it provided the Federal Government with the power to protect these rights should States try to infringe on

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[2] *See* Guy Gugliotta, *New Estimate Raises Civil War Death Toll*, N.Y. TIMES (Apr. 2, 2012), https://www.nytimes.com/2012/04/03/science/civil-war-toll-up-by-20-percent-in-new-estimate.html.

them. Congress designed the Amendment to radically shift the federal-state balance of power. The States ratified the Fourteenth Amendment on July 28, 1868.

This Court has held that the first section of the Fourteenth Amendment incorporates at least some of the Bill of Rights against the States, although there has been disagreement over whether incorporation is proper under the Amendment's Due Process Clause or Privileges and Immunities Clause. *See McDonald v. City of Chicago*, 561 U.S. 742, 754-767 (2010) (recounting the various approaches to incorporation). It is almost universally accepted, however, that the incorporation analysis must begin by putting the Amendment in its historical context and examining the intent of the Framers. *See, e.g.*, *id.* at 778 (looking at what the Framers "counted" as a "fundamental right[]"); *id.* at 842 (Thomas, J., concurring) (looking at what the Framers "understood"); *id.* at 863 (Stevens, J., dissenting) (looking at the "historical evidence" of what the Framers "thought"); *id* at 918 (Breyer, J., dissenting) (taking "account of the Framers' basic reason[ing]").

The Framers intended the Fourteenth Amendment to be a bulwark against States infringing on citizens' civil rights, with special attention to the invidious tactics Southern States used to strip African Americans of their rights. As a result, a critical question that the Court should ask during an incorporation inquiry is whether the right at issue protects against the kind of tactics Southern States used to repress Black people in the post-Civil War

period. If the right does, then the Framers would have intended for it to be incorporated against the States.

Under this test, the Court should hold that the Eighth Amendment Excessive Fines Clause is incorporated against the States. The Framers would have intended the constitutional protection against disproportionate financial punishment to apply equally across the country to ensure that States do not use debilitating fines and forfeitures as a tool to subjugate citizens.

The framework proposed in this brief also opens the door to reexamining other aspects of this Court's incorporation doctrine. Given that the Court has recognized a shift in its incorporation jurisprudence, and has incorporated most of the Bill of Rights, *see McDonald*, 561 U.S. at 764-65 & n.12, the Court should take the opportunity in appropriate cases to revisit its rulings refusing to incorporate three of the Bill of the Rights' guarantees. *See Hurtado v. California*, 110 U.S. 516 (1884) (refusing to incorporate Fifth Amendment's Grand Jury Clause); *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211 (1916) (same for Seventh Amendment civil jury trial right); *Apodaca v. Oregon*, 406 U.S. 404 (1972) (same for Sixth Amendment unanimous jury verdict right).

Most pressing is the need for the Court to revisit *Apodaca*—its decision refusing to incorporate the Sixth Amendment right to a unanimous jury verdict in a criminal trial. *Apodaca* is inconsistent with this Court's current jurisprudence, as eight of the Justices

in *Apodaca* believed the Sixth Amendment applied to the States and the Federal Government equally, and the Court has repeatedly held the Sixth Amendment requires unanimity in federal criminal trials. *See, e.g.*, *United States v. Booker*, 543 U.S. 220, 230 (2005); *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). Moreover, the *Apodaca* plurality opinion was based on the notion that there was no "proof" unanimity was needed to protect defendants from prejudice and ensure minority jurors have a voice during deliberations. Yet Louisiana and Oregon, the only states with non-unanimous jury provisions, specifically enacted the provisions to silence minority jurors and more easily convict minority defendants. Applying the incorporation lens proposed in this brief confirms that *Apodaca* was wrongly decided.

ARGUMENT

I. THE FOURTEENTH AMENDMENT WAS INTENDED TO GUARANTEE IMPORTANT RIGHTS TO ALL PEOPLE AND TO ACT AS A GUARD AGAINST STATES ABUSING THOSE RIGHTS.

In recent years, when determining whether to incorporate a provision of the Bill of Rights, the Court has put itself in the shoes of the "Framers and ratifiers of the Fourteenth Amendment" and asked whether they would have intended to incorporate the right against the States to maintain "our system of ordered liberty." *McDonald*, 561 U.S. at 778. When undertaking this inquiry, the Court has considered

contemporaneous congressional statements.[3] It has also placed the Amendment in context by looking at the "history that the [framing] generation knew." *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008).[4] Thus, the starting place for an incorporation question is the history of the Fourteenth Amendment.

After the Civil War, "Congress was [called] to devise a formula, in which the South would acquiesce, 'to secure in a more permanent form the dear bought victories achieved in the mighty conflict.'"[5] As Massachusetts Senator Henry Wilson said, the goal was to ensure that "the curse of civil war may never be visited upon us again."[6] The Reconstruction Congress was determined to secure "lawful liberty"

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[3] *See, e.g.*, *McDonald*, 561 U.S. at 772 (quoting statements of Sen. Henry Wilson); *id.* at 775 (quoting statements of Rep. John Bingham); *id.* (quoting statements of Sen. Samuel Pomeroy); *District of Columbia v. Heller*, 554 U.S. 570, 616 (2008) (quoting statements of Sen. Davis and Rep. Nye).

[4] *See also McDonald*, 561 U.S. at 745 (taking a "survey of the contemporaneous history" of the Fourteenth Amendment); *id.* at 762 (looking at "[e]vidence from the period immediately following the ratification of the Fourteenth Amendment"); *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968) (looking at the "history and experience" of "[t]hose who wrote our constitutions," when deciding whether the Sixth Amendment jury trial right is incorporated against the States).

[5] WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 44 (1995) (quoting Governor's Message, *Des Moines Iowa State Register*, p.3 col. 7 (Jan. 15, 1868)).

[6] CONG. GLOBE, 38th Cong., 1st sess. 1203 (1864) (statement of Sen. Henry Wilson).

"in all the states of the Union, and to all the people, white and black alike."[7]

To that end, almost immediately after the War, the country ratified the Thirteenth Amendment, abolishing slavery.[8] Still, the Southern States were unwilling to end the institution. As one Southern legislator wrote Ohio Senator John Sherman, the South was "determined to do by policy what [it] had failed to do with arms."[9] Although many Southern whites "conceded that blacks were no longer slaves of individual masters," they "intended to make them slaves of society."[10] As a Union Army commander in Virginia put it: Southern whites wanted to reduce Black people "to a condition which will give the former masters all the benefits of slavery, and throw upon them none of its responsibilities."[11]

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[7] NELSON, *supra* note 5, at 43 (quoting *The Source of Mr. Steven's Power*, N.Y. EVENING POST, p.3 col 1 (Mar. 14, 1866)).

[8] *See 13th Amendment to the U.S. Constitution: Abolition of Slavery, America's Historical Documents*, NAT'L ARCHIVES, https://www.archives.gov/historical-docs/13th-amendment (last visited Sep. 4, 2018).

[9] NELSON, *supra* note 5, at 41 (Letter from Jesse Shortess to John Sherman, JOHN SHERMAN PAPERS, LIBRARY OF CONGRESS, Washington, D.C. (Dec. 24, 1865)).

[10] Paul Finkelman, *This Historical Context of the Fourteenth Amendment*, 13 TEMP. POL. & CIV. RTS. L. REV. 389, 400 (2004) (quotation marks omitted) ("*Historical Context*").

[11] NELSON, *supra* note 5, at 43.

To recreate a slavery-like existence, between 1865 and 1866,[12] Southern States passed "infamous black codes,"[13] "designed to replicate, as closely as possible, the pre-war suppression and exploitation of blacks."[14] "The Black Codes represented a legalized form of slavery in which each southern state perpetuated the master-slave relationship by passing apprenticeship laws, labor contract laws, vagrancy laws and restrictive travel laws . . . denying African Americans civil rights and due process of law."[15]

For example, Louisiana passed a law resembling "antebellum fugitive slave laws," which made it a crime to "persuade or entice away, feed, harbor or secret any person who leaves his or her employer."[16]

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[12] *See* John Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855, 869 (1966).

[13] NELSON, *supra* note 5, at 43.

[14] Finkelman, *Historical Context*, *supra* note 10, at 402. *See also The Civil Rights Cases*, 109 U.S. 3, 36-37 (1883) (Harlan, J., dissenting) ("Recall the legislation of 1865-66 in some of the States, of which this court, in the Slaughterhouse Cases, said that it imposed upon the colored race onerous disabilities and burdens; curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value; forbade them to appear in the towns in any other character than menial servants; required them to reside on and cultivate the soil, without the right to purchase or own it; excluded them from many occupations of gain; and denied them the privilege of giving testimony in the courts where a white man was a party.").

[15] Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 55 n.62 (1995).

[16] Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 AKRON L. REV. 671, 681-82 (2003) (quotation marks omitted).

Mississippi passed a law requiring Black people to "have a lawful home or employment" and then passed a vagrancy law that "allowed government authorities to auction off . . . any black who did not have a labor contract."[17] Georgia passed a vagrancy law that allowed "vagrants" to be "arrested and sentenced to work on the public roads . . . or be bound-out for up to a year to someone."[18] And Alabama's vagrancy law "allowed for the incarceration in the public workhouse of any laborer or servant who loiters away his time, or refuses to comply with any contract for a term of service without just cause."[19] These laws, and many others like them, created a "new system of forced labor," reducing Black people "to a status somewhere between that of slaves (which they no longer were) and full free people (which most white southerners opposed)."[20]

The Southern campaign to subjugate Black people was not limited to repressive laws. It also included horrific and widespread violence. To that point, in 1866, several U.S. Military leaders testified to Congress about the pervasive violence perpetrated by whites against Blacks in the former Confederacy. Major General Clinton Fisk testified about Southern whites pursuing Black people "with vengeance and treat[ing] them with brutality."[21] Major General

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[17] *Id.* at 683 (quotation marks omitted).
[18] *Id.* (quotation marks omitted).
[19] *Id.* at 684 (quotation marks omitted).
[20] *Id.* at 685 (parentheticals omitted).
[21] *Id.* at 688.

Edward Hatch testified that Black people understood that they were "not safe from the poor whites," and that if they resisted the "reestablishment of bondage then they were liable to be shot."[22] When Lieutenant Colonel R.W. Barnard was asked if it was safe to remove Union troops from Tennessee, he responded by relating what someone else had told him: "I tell you what, if you take away the military from Tennessee, the buzzards can't eat up the niggers as fast as we'll kill 'em."[23] Massachusetts Senator Charles Sumner received a "box containing the finger of a black man," with a note that read, "'You old son of a bitch, I send you a piece of one of your friends.'"[24]

White abolitionists and Union sympathizers also faced Southern aggression.[25] White people were "thrown into prison" for telling freed Black people "they were rightfully entitled to vote."[26] Massachusetts Representative Benjamin Butler described the dire situation: "Northerners could not go South and argue the principles of free government without fear of the knife or pistol, or of being murdered by a mob."[27]

It was against this backdrop the Reconstruction Congress was compelled to act. It was clear that the

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[22] *Id.* at 687-88. (quotation marks omitted).
[23] *Id.* at 688 (quotation marks omitted).
[24] *Id.* at 685.
[25] *See, e.g.*, MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 136 (1986).
[26] *Id.* at 135-36.
[27] NELSON, *supra* note 5, at 42 (quotation marks omitted).

Thirteenth Amendment could not sufficiently protect the rights of African Americans, and that a shift in the federal-state power balance was needed if Black people were to be protected. Thus, in December 1865, Congress formed the Joint Committee on Reconstruction. The Committee consisted of six Senators and nine Congressmen, who were charged with "investigat[ing] conditions in the South."[28] As part of its investigation, the Committee "interviewed scores of people—former slaves, former confederate leaders and slave owners, United States Army officers, and others in the South."[29]

Out of this Committee came the country's first attempt to pass a law aimed at remediating the abuses perpetrated in the South under the Black Codes—the Civil Rights Act of 1866.[30] The Act declared that "all persons" "of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right[s] in every State and Territory in the United States" and "full and equal benefit of all laws and proceedings . . . as enjoyed by white citizens."[31]

There were widespread concerns with the Act, however. Some, including President Andrew Johnson, questioned its constitutionality, believing that "the Constitution did not confer on Congress the power to

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[28] Finkelman, *Historical Context*, *supra* note 10, at 400.
[29] *Id.*
[30] Act of April 9, 1866, ch. 31, 14 Stat. 27.
[31] *Id.* § 1.

make rules to regulate the acts of states."[32] A contingent of congressmen agreed with President Johnson and bemoaned this lack of power, complaining that "the citizens of the South and of the North going South have not hitherto been safe in the South, for want of constitutional power in Congress to protect them."[33] Others thought that the Act, even if constitutional, did not go far enough; that the Act's protections could be easily rescinded should the political winds change.[34]

The Joint Committee thus did not stop with the Civil Rights Act. It also proposed a constitutional amendment.[35] "[T]he Committee concluded that nothing short of a Constitutional amendment—what became the Fourteenth Amendment—would protect the rights of the former slaves."[36] The Committee knew it was "framing an amendment of our fundamental law, which may exist for centuries without change."[37] The Committee also understood it was "making history, and laying foundations for our future national building."[38] This was going to be the amendment that "secur[ed] the fruits both of the war and of the three decades of antislavery agitation

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[32] John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L.J. 1135, 1136 (1990).
[33] CURTIS, *supra* note 25, at 138-139.
[34] *See* CURTIS, *supra* note 25, at 55, 62-63, 86.
[35] Finkelman, *Historical Context*, *supra* note 10, at 400.
[36] *Id.* at 401.
[37] CONG. GLOBE, 39th Cong., 1st sess. 385 (1866) (statement of Rep. Jehu Baker).
[38] NELSON, *supra* note 5, at 45 (quotation marks omitted).

proceeding it."[39] To meet these goals, the Framers designed the amendment to: (1) guarantee all people, especially Black people, the privileges enshrined in the Bill of Rights, and (2) protect citizens' rights from potential State abuse.

When debating the proposed amendment, Ohio Congressman John Bingham—"The Father" of the Fourteenth Amendment[40]—explained that "the States of the Union [] have flagrantly violated the absolute guarantees of the Constitution of the United States to all its citizens."[41] He therefore declared that it was "time that [they] take security for the future, so that like occurrences may not again arise to distract our people and finally to dismember the Republic."[42]

Bingham later gave a speech "[i]n support of the proposed amendment to enforce the Bill of Rights."[43] Bingham made clear that an animating feature of the proposed amendment was that it would prohibit legislation "and practices that reduce groups to the

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[39] NELSON, *supra* note 5, at 61.

[40] Gerard N. Magliocca, *The Father of the 14th Amendment*, N.Y. TIMES (Sept. 17, 2003), https://opinionator.blogs.nytimes.com/2013/09/17/the-father-of-the-14th-amendment/.

[41] CONG. GLOBE, 39th Cong., 1st sess. 158 (1866) (statement of Rep. John Bingham).

[42] *Id.*

[43] *Id.* at 1088; *see* Speech of John A. Bingham, *In Support of the Proposed Amendment to Enforce the Bill of Rights* (Feb. 28, 1866), https://archive.org/stream/onecountryonecon00bing#page/n1.

position of a lower or disfavored caste."[44] Bingham declared that the amendment was "essential to the safety of all people of every State" as it "arm[s] the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today."[45]

Other key congressmen described the proposed amendment similarly. Representative Thaddeus Stevens explained that up until that point, the "Constitution limit[ed] only the action of Congress, and [was] not a limitation on the States. This amendment supplies that defect . . . ."[46] Senator Jacob Howard of Michigan pointed out that there was "no power given in the Constitution to enforce and to carry out any of the [Bill of Rights'] guarantees."[47] Thus, the "great object" of the proposed amendment was "to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[48] Illinois Representative Jehu Baker put a finer point on why Congress needed to pass the amendment, asking, "What business is it of any State

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[44] Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination*, 58 U. MIAMI L. REV. 9, 9-10 & n.5 (2004).

[45] CONG. GLOBE, 39th Cong., 1st sess. 1088 (1866) (statement of Rep. John Bingham).

[46] CONG. GLOBE, 39th Cong., 1st sess. 2459 (1866) (statement of Rep. Thaddeus Stevens).

[47] CONG. GLOBE, 39th Cong., 1st sess. 2765 (1866) (statement of Sen. Jacob Howard).

[48] *Id.* at 2766.

to do things here forbidden [by the Bill of Rights]? [T]o rob the American citizen of rights thrown around him by the supreme law of the land?"[49] Baker went on: "When we remember to what an extent this has been done in the past, we can appreciate the need of putting a stop to it in the future."[50]

Representative Bingham eloquently summed up the State abuses that made the protections embodied in the Fourteenth Amendment necessary:

> The States never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws . . . . [T]he States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States . . . the citizen had no remedy. They denied trial by jury, and he had no remedy. They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he

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[49] CONG. GLOBE, 39th Cong., 1st sess. app'x at 256 (1866) (statement of Rep. Jehu Baker).
[50] *Id.*

> had no remedy. They bought and sold men who had no remedy.[51]

Bingham concluded by explaining that the Constitution, with the ratification of the Fourteenth Amendment, now provided a remedy against such abuses:

> Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in States and by States, or combinations of persons?[52]

In short, the Fourteenth Amendment's historical context shows that the Framers' "goals were sweeping and broad."[53] And, after much debate, the Thirty-Ninth Congress adopted the Fourteenth Amendment, reflecting discontent "with the protection individual liberties had received from the states" and "increased concern for the rights of blacks."[54] Congress wanted citizens, especially Black citizens, to be "shielded from hostile state action."[55] And to achieve these goals, Congress, by passing the Fourteenth Amendment, "significantly altered our system of government." *McDonald*, 561 U.S. at 807.

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[51] CONG. GLOBE, 42d Cong., 1st sess. app'x at 85 (1871). (statement of Rep. John Bingham).
[52] *Id.*
[53] Finkelman, *Historical Context*, *supra* note 10, at 409.
[54] CURTIS, *supra* note 25, at 91.
[55] *Id.*

II. THE FRAMERS WOULD HAVE INTENDED FOR THE EXCESSIVE FINES CLAUSE TO APPLY TO THE STATES.

With this history in mind, this Court should hold that the Fourteenth Amendment incorporates the Excessive Fines Clause. Because the Clause protects against abusive governmental practices of the kind commonly used to subjugate Black people in the post-Civil War period, the Framers would have intended its protections to apply against the States.

The Court has explained that the Excessive Fines Clause "was taken verbatim from the English Bill of Rights of 1689." *United States v. Bajakajian*, 524 U.S. 321, 335 (1998) (citing *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266-267 (1989)). And the Excessive Fines Clause in the English Bill of Rights "was a reaction to the abuses of the King's judges during the reigns of the Stuarts." *Id.* The Founders included the Clause in the U.S. Constitution "as an admonition . . . against such violent proceedings, as had taken place in England," including "[e]normous fines and amercements [that] were . . . sometimes imposed."[56] Based on this history, this Court emphasized that the "*primary* focus of the [E]ighth] Amendment is [to protect against] the potential for governmental abuse of its prosecutorial power." *Browning-Ferris*, 492 U.S. at 266 (emphasis added).

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[56] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1896, at 750-51 (1833).

The goal of the Eighth Amendment was to protect against the Government unfairly wielding its power to punish citizens. This was also a key concern of the Fourteenth Amendment. The Framers were aware of the evils that attend the unchecked ability to mete out punishment, and therefore intended the Fourteenth Amendment to protect against it. The Framers no doubt would have wanted the Eighth Amendment's protection against excessive punishment—including excessive fines—to extend to the States. Consistent with what the Framers intended, the Court has said that the Fourteenth Amendment "makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States." *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433-34 (2001).[57]

The Framers made their intent of incorporating the entire Eighth Amendment clear when debating the reach of the Fourteenth Amendment. Throughout the debates, congressmen repeatedly highlighted the concern of States using exorbitant punishment to suppress Black people with no federal recourse. For example, as Representative Bingham said when closing debate on the Fourteenth Amendment: "cruel and unusual punishments have been inflicted under State laws within this Union upon citizens not only for crimes committed, but for sacred duty done, for which and against which the Government of the

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[57] The Indiana Supreme Court believed this was dictum. *See Indiana v. Timbs*, 84 N.E.3d 1179, 1182 (Ind. 2017), *cert. granted*, 138 S. Ct. 2650 (2018) (Mem.).

United States had no provided remedy and could provide none."[58]

The concerns of the Fourteenth Amendment's Framers about States meting out unjust punishment did not turn on what form the punishment took. In other words, the Framers did not exalt the Eighth Amendment's protection against "cruel and unusual punishments" over its protections against "excessive bail" or "excessive fines." *See* U.S. Const. amend. VIII. The Framers believed that *all* unjust punishment—especially punishment targeted at disenfranchising Black people—was abhorrent. Bingham did not mince words on this point, declaring "[i]t was an opprobrium to the Republic that for fidelity to the United States [that citizens] could not by national law be protected against the degrading punishment inflicted on slaves and felons by State law."[59] The Fourteenth Amendment repaired this injustice by "strik[ing] down those State rights and invest[ing] all power in the General Government."[60]

The need for the Excessive Fines Clause to apply to the States is underscored by the fact that today, state and local governments increasingly use fines to punish crime.[61] The money from the fines is then used

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[58] CONG. GLOBE, 39th Cong., 1st sess. 2542 (1866) (statement of Rep. John Bingham) (internal quotation marks omitted).
[59] *Id.* at 2543.
[60] *Id.* at 2500 (statement of Rep. George Shanklin).
[61] *See* COUNCIL OF ECONOMIC ADVISERS ISSUE BRIEF, FINES, FEES, AND BAIL at 2-3 (Dec. 2015),

to fund local government.[62] As a result, the incentive to punish petty crime with excessive fines is greater than before.[63] And compounding the harm, state and local governments are disparately imposing these fines against Black Americans and other people of color.[64] This type of discriminatory punishment is the kind of wrong the Framers designed the Fourteenth Amendment to protect against.

Last fall, the U.S. Commission on Civil Rights issued a report entitled *Targeted Fines and Fees Against Communities of Color*.[65] One of the Report's key findings was that "unchecked discretion [and] stringent requirements to impose fines or fees can lead and have led to discrimination and inequitable access to justice when not exercised in accordance with protections afforded under [the Constitution]."[66]

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https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf.

[62] CRIM. JUSTICE POLICY PROGRAM AT HARV. L. SCH., CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM at 1 (Sep. 2016), http://cjpp.law.harvard.edu/assets/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform-FINAL.pdf.

[63] *Id.*

[64] *See, e.g.*, Michael Martinez, et al., *Policing for Profit: How Ferguson's Fines Violated Rights of African-Americans*, CNN (Mar. 6, 2015), https://www.cnn.com/2015/03/06/us/ferguson-missouri-racism-tickets-fines/index.html.

[65] U.S. COMM'N ON CIVIL RIGHTS, TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR: CIVIL RIGHTS & CONSTITUTIONAL IMPLICATIONS (Sept. 2017), https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2017.pdf.

[66] *Id.* at 71.

The Report noted that since the 1980s, States and municipalities have increasingly used fines and fees as punishment for "low-level offenses" to "generate revenue."[67] The jurisdictions that use fines as a revenue source often "have a larger percentage of African Americans and Latinos relative to the demographics of the median municipality."[68] One article that the Report cited found that there was "one demographic that was most characteristic of cities that levy large amounts of fines on their citizens: a large African American population."[69]

The amount of criminal debt people face today is staggering—"some 10 million people owe more than $50 billion from contact with the criminal justice system."[70] Failure to pay this debt has debilitating

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[67] *Id.* at 7.

[68] *Id.* at 22. One study, after sampling "local governments in nine thousand cities," found that "fines and fees contribute to the revenue for roughly 86% of cities and are higher in locales with larger Black populations." Moreover, "[c]ities that have larger Black populations generate $12-$19 more in revenue from fees and fines per person, compared to those with smaller shares of Black citizens." Pamela Chan, et al., *Forced to Walk a Dangerous Line: The Causes and Consequences of Debt in Black Communities*, PROSPERITY NOW at 10 (March 2018), https://prosperitynow.org/sites/default/files/resources/Forced%20to%20Walk%20a%20Dangerous%20Line.pdf.

[69] Dan Kopf, *The Fining of Black America*, PRICEONOMICS (June 24, 2017), https://priceonomics.com/the-fining-of-black-america/.

[70] Katherine D. Martin et al., *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-entry They Create*, HARV. KENNEDY SCH. & NAT'L INST. OF JUSTICE at 5 (Jan. 2017), https://www.ncjrs.gov/pdffiles1/nij/249976.pdf.

consequences,[71] including "driver license suspension, which presents a significant barrier to employment"; "bad credit reports that can keep a family from renting or purchasing a home"; "and in some cases, jail time."[72] And people who are jailed for criminal debt must face all the residual effects, including the trauma of being "locked in a cage"[73] "torn away from their communities and families"[74]; and the difficulty of "maintaining employment," making it harder (if not impossible) to survive financially once released.[75]

Simply, the need for the Eighth Amendment to protect citizens from excessive fines is as evident today as it was in 1868. In line with the intent of the Framers, the Court should hold that the Fourteenth Amendment incorporates the Eighth Amendment's Excessive Fines Clause.

III. THE COURT SHOULD MORE CLOSELY ALIGN ITS PAST INCORPORATION CASES WITH THE HISTORY ANIMATING THE FOURTEENTH AMENDMENT.

The Court has recognized that there has been a shift in its incorporation jurisprudence. Particularly,

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[71] *See* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 277, 290-95 (2014).

[72] U.S. COMM'N ON CIVIL RIGHTS, *supra* note 65, at 35-36.

[73] Mika'il DeVeaux, *The Trauma of the Incarceration Experience*, 48 HARV. C.R.-C.L. L. REV. 257, 257 (2013).

[74] Roopal Patel & Meghna Philip, *Criminal Justice Debt, A toolkit for Action*, BRENNAN CTR. FOR JUSTICE at 6 (2012), https://www.brennancenter.org/sites/default/files/legacy/publications/Criminal%20Justice%20Debt%20Background%20for%20web.pdf.

[75] *Id.*

the Court has "shed any reluctance to hold that rights guaranteed by the Bill of Rights me[e]t the requirements for protection under the Due Process Clause." *See McDonald*, 561 U.S. at 764-65. This brief offers a more uniform approach to incorporation, which would also open a door to reexamining prior decisions refusing to incorporate certain provisions of the Bill of Rights.

When appropriate, the Court should revisit its cases refusing to incorporate the Fifth Amendment's Grand Jury Clause and Seventh Amendment civil jury trial right. *See Hurtado*, 110 U.S. 516 (refusing to incorporate the Fifth Amendment's Grand Jury Clause); *Minneapolis & St. Louis R.R.*, 241 U.S. 211 (same for Seventh Amendment civil jury trial right). The Founders believed that both rights were critical guards against oppressive government power;[76] the Court should therefore reconsider whether they apply against the States.

Even more pressing, the Court should grant certiorari in an appropriate case to revisit its decision refusing to incorporate the Sixth Amendment's unanimous jury verdict right. *Apodaca*, 406 U.S. 404

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[76] *See Hurtado*, 110 U.S. at 549, 558 (Harlan, J., dissenting) (explaining that the Founders "jealously guarded" the grand jury right because it "secures [a defendant] against unfounded accusation"); *Parklane Hosiery v. Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting) ("The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary.").

(plurality op.).[77] *Apodaca* is no longer compatible with this Court's case law, and it is sharply inconsistent with the incorporation framework proposed in this brief.

In *Apodaca*, "eight Justices agreed that the Sixth Amendment applies identically to both the Federal Government and the States." *McDonald*, 561 U.S. at 766 n.14. And this Court recently reiterated that the Sixth Amendment requires unanimity in federal criminal trials. *See Booker*, 543 U.S. at 230 ("It has been settled throughout our history that the Constitution protects every criminal defendant 'against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). Thus, if eight of the Justices in *Apodaca* agreed that the Sixth Amendment applies identically to both the Federal Government and the States, applying the Court's case law, unanimous jury verdicts should also be required in state criminal trials. *Apodaca* does not make sense considering this Court's established law.

The Court should also revisit *Apodaca* because it is inconsistent with the intent of the Framers, who were particularly concerned with state practices that subjugate African Americans. The *Apodaca* plurality was based on a misapprehension of the protections unanimity provides against racial and ethnic

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[77] *Apodaca* was decided the same day as *Johnson v. Louisiana*, 406 U.S. 356 (1972). *Johnson* held the Fourteenth Amendment did not itself require unanimity in state criminal trials.

prejudice infecting jury trials. Petitioners in *Apodaca* argued that unanimity protects against the silencing of minority jurors, and ensures convictions are based on evidence and not animus. *See Apodaca*, 406 U.S. at 412-13. The plurality rejected this argument because it "simply [found] no proof for the notion that a majority will disregard its instructions and cast its votes for guilt or innocence based on prejudice rather than the evidence." *Id.* at 413-14. Nor would the plurality "assume that the majority of the jury will refuse to weigh the evidence and reach a decision upon rational grounds . . . or that a majority will deprive a man of his liberty on the basis of prejudice when a minority is presenting a reasonable argument in favor of acquittal." *Id.*

But the history of Louisiana and Oregon's non-unanimity provisions reveals that the plurality was mistaken. Both states' provisions were enacted with discriminatory intent and were designed to facilitate convictions over the dissent of minority jurors.

Louisiana adopted its non-unanimity provision during the state's 1898 Constitutional Convention. As two scholars summarized: "the sinister purpose of the Convention was to create a racial architecture in Louisiana that could circumvent the Reconstruction Amendments and marginalize the political power of black citizens."[78] The Chair of the Convention's

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[78] Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 LA. L. REV. 361, 374-75 (2012).

Judiciary Committee, Judge Thomas Semmes, openly declared that the Convention's purpose was "to establish the supremacy of the white race."[79] "The Convention of 1898 interpreted its mandate from the [Louisiana] people to be, to disfranchise as many Negroes and as few whites as possible." *United States v. Louisiana*, 225 F. Supp. 353, 371 (E.D. La. 1963).

Contemporaneous accounts reveal the purpose of the non-unanimous jury provision adopted at the Convention was to silence the voices of Black jurors. The provision would also make it easier for juries to convict Black people. One local newspaper espoused that "[a]s a juror, [a Black person] will follow the lead of his white fellows in causes involving distinctive white interests; but if a negro be on trial for any crime, he becomes at once his earnest champion, and a hung jury is the usual result."[80] Another "commentator went so far as to claim that criminals would simply not be convicted because of the African-American presence in the jury box."[81] It was also widely believed that Black people were not of "much advantage in any capacity in the courts of law" because they were "ignorant, incapable of determining credibility, and susceptible to bribery."[82]

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[79] *Id.* at 375 (quoting *Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana: Held in New Orleans, Tuesday, February 8, 1898*, at 374 (1898)).
[80] *Id.* at 375 (quoting *Future of the Freedman*, DAILY PICAYUNE, Aug. 31, 1873, at 5).
[81] *Id.* at 376 (citing *The Present Jury System*, DAILY PICAYUNE, Apr. 20, 1870, at 4).
[82] *Id.* at 375-76.

These were the sentiments that sparked Louisiana to adopt its non-unanimity provision.

The history of Oregon's non-unanimous jury provision is no better. In the late 1920s and early 1930s, Oregon was in a "deep [] recession and caught up in the growing menace of organized crime and the bigotry and fear of minority groups."[83] Oregon was a "society where racism, religious bigotry, and anti-immigrant sentiments were deeply entrenched in the laws, culture, and social life."[84]

Amid all this, there was a high-profile murder trial. Jacob Silverman, a Jewish man, was charged with shooting Jimmy Walker, a Protestant.[85] The jury convicted Silverman of manslaughter and hung on the murder charge 11-1 in favor of conviction.[86] Silverman was sentenced to three years in prison and fined $1000.[87]

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[83] Aliza B. Kaplan & Amy Saack, *Overturning* Apodaca v. Oregon *Should Be Easy: Nonunanimous Jury Verdicts in Criminal Cases Undermine the Credibility of Our Justice System*, 95 OR. L. REV. 1, 4 (2016) (quotation marks omitted).

[84] *Id.* at 4 (quotation marks and brackets omitted). One stark example of Oregon's bigoted past: Black people were banned altogether from the state in the mid-1800s. *See* DeNeen L. Brown, *When Portland Banned Blacks: Oregon's Shameful History as an 'All-White' State*, WASH. POST (June 7, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/06/07/when-portland-banned-blacks-oregons-shameful-history-as-an-all-white-state/?utm_term=.a8d842e8ea01.

[85] Kaplan & Saack, *supra* note 83, at 3.

[86] *Id.* at 3-4.

[87] *Id.* at 5.

In response, the Oregon legislature "proposed a constitutional amendment allowing nonunanimous verdicts."[88] Articles in the local paper, *The Morning Oregonian*, highlighted the bigoted roots of the proposed amendment. One article specifically cited the Silverman case as coming "at exactly the right time to bring unprecedent pressure to bear upon the legislature."[89] Said another article, "Americans have learned, with some pain, that many peoples in the world are unfit for democratic institutions, lacking the traditions of the English-speaking peoples."[90] Yet another article lamented the "increased urbanization of American life" as "the vast immigration into America from southern and eastern Europe, of people untrained in the jury system, have combined to make the jury of twelve increasingly unwieldy and unsatisfactory."[91]

Both Louisiana and Oregon's non-unanimous jury provisions were founded in bigotry. These provisions therefore perpetuate the very abuses the Fourteenth Amendment prohibits. And the Framers considered the jury trial right an important right that must be fully protected against state abuse. As Representative Bingham said: before the Fourteenth Amendment, States "denied trial by jury," but once it passed, the

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[88] *Id.* at 5.

[89] *Id.* (quoting *Jury Reform Up to Voters*, MORNING OREGONIAN (Dec. 11, 1933) (quotation marks omitted).

[90] *Id.* (quoting *Debauchery of Boston Juries*, MORNING OREGONIAN (Nov. 3, 1933) (quotation marks omitted).

[91] *Id.* (quoting *One Juror Against Eleven*, MORNING OREGONIAN (Nov. 25, 1933) (quotation marks omitted).

Constitution would "provide against all such abuses and denials of right."[92]

When presented with a case that raises the issue, the Court should revisit *Apodaca* and incorporate the Sixth Amendment's unanimity requirement.

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[92] CONG. GLOBE, 42d Cong., 1st sess. app'x. at 85 (1871) (statement of Rep. John Bingham).

CONCLUSION

150 years ago, when the Fourteenth Amendment was ratified, our Nation made its most significant step towards fulfilling the equality promised by the Declaration of Independence. The Fourteenth Amendment ensured that *all* citizens—Black and white—were guaranteed the rights embodied in the Constitution and provided protections should States try to deprive citizens of their rights. In accord with the Fourteenth Amendment's purpose and the intent of its Framers, the Court should hold that the Fourteenth Amendment incorporates the Eighth Amendment's Excessive Fines Clause.

Respectfully submitted,

Sherrilyn A. Ifill
Director-Counsel
Janai S. Nelson
Samuel Spital
NAACP Legal Defense & Educational Fund, Inc.
40 Rector Street,
5th Floor
New York, NY 10006

Daniel S. Harawa*
NAACP Legal Defense & Educational Fund, Inc.
700 14th St. NW
Suite 600
Washington, DC 20005
(202) 682-1300
dharawa@naacpldf.org

Counsel for Amicus Curiae

**Counsel of Record*

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